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No. 10, Original

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF WYOMING AND THE OHIO OIL COMPANY,
DEFENDANTS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF WYOMING AND THE OHIO OIL COMPANY, DEFENDANTS

BRIEF FOR THE UNITED STATES

JURISDICTION

This is an action brought by the United States against the State of Wyoming and The Ohio Oil Company pursuant to leave granted by the Court on October 9, 1944 (323 U. S. 669). The original jurisdiction of the Court is invoked under Article III, Sec. 2, cl. 2, of the Constitution, and Section 233 of the Judicial Code (28 U. S. C. 341).

QUESTIONS PRESENTED

1. Whether under the grant of school lands contained in the Wyoming Enabling Act of 1890, a survey in 1892 of the exterior bounds of a town-

ship is sufficient to divest the United States of title to the future section 36 in that township.

2. Whether the United States is entitled to recover the full value of the oil extracted from section 36 by The Ohio Oil Company from the beginning of production and all income derived from the section by the Company, where it is pleaded and proved that the defendants are trespassers and there is no evidence to show the trespass was innocent.

3. Whether the United States is entitled to a joint and several judgment against both defendants for the moneys paid by The Ohio Oil Company and received by the State of Wyoming as royalties on the oil extracted from section 36 since the beginning of production.

4. Whether the United States is liable for costs incurred by either of the defendants.

5. Whether, if the plaintiff prevails, the date of the judgment or the date the property is surrendered, should control the termination of any supplemental period of accounting allowed after the entry of judgment.

STATUTES INVOLVED

Section 6 of the Act of August 9, 1888, c. 819, 25 Stat. 393; Enabling Act of July 10, 1890, c. 664, 26 Stat. 222, and the Act of February 28, 1891, c. 384, 26 Stat. 796. (See Appendix, pp. 66–76.)

STATEMENT

This is an action to quiet in the United States the title to 640 acres of public land in Wyoming contained in a section 36, and to recover the full value of the oil extracted from the land. The State of Wyoming claims under a land grant from the United States set out in the enabling act admitting the State into the Union. The other defendant, The Ohio Oil Company, claims as lessee from Wyoming. It is the Government's position, adopted by the Special Master, that title to the section never vested in Wyoming under the grant, since the land was reserved for federal public use before the section was created by an approved survey of its lines.

The case splits into two main issues: the title question—whether the United States is the owner of the section 36 in controversy; the accounting question—whether the United States is entitled to recover the value of the oil extracted by the defendants from section 36 and, if so, the measure of damages to be applied. The Special Master held in favor of the United States on the title issue and in favor of the defendants on the accounting issue. The case is now before the Court on the exceptions and objections of the parties to the Special Master's report.

The title issue (Objections to findings 4–7, 9, 11, 12)[1].—Wyoming was organized as a territory by the Organic Act of July 25, 1868, c. 235, 15 Stat. 178. It was admitted into the Union under the Enabling Act of July 10, 1890, c. 664, 26 Stat. 222. Section 4 of the Enabling Act granted "for the support of common schools," "sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, * * *" (Appendix, p. 68.) Also, section 4 assimilated the provisions of section 6 of the Act of August 9, 1888, c. 819, 25 Stat. 393, thus empowering Wyoming to select lieu lands where it was found upon survey that sections 16 and 36 "have been or shall hereafter be reserved for public purposes." (Appendix, p. 66.) In addition by the subsequent Act of February 28, 1891, c. 384, 26 Stat. 796, Congress granted "other lands of equal acreage" to

[1] These are findings of probative or evidentiary facts intended to lead to the ultimate finding that the United States owns the land (fdg. 3, R. 457). The plaintiff's objections (R. 462–464) to these findings of evidentiary facts relate to minor factual errors and inaccuracies; the ultimate finding of title in the United States is wholly correct. Under the plan of the brief each objection is discussed in connection with the point to which it relates. A separate index of the Government's objections and exceptions follows the index to the brief.

be selected by the State when sections 16 or 36 "are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States (Appendix, pp. 72–73).

In 1892 steps were taken to procure a survey of public lands in Wyoming preliminary to fulfilling the various donations contained in the Enabling Act. The United States entered into a contract with Augustus L. Coleman to survey the exterior lines of 12 townships in Wyoming and to subdivide those townships into sections. One of the townships (township 58, range 100 west) embraced the future section 36 here in controversy. (Fdgs. 4, 5 ,6, R. 457–458.)[2] Coleman ~~Colman~~ sur-

[2] The Government's objections to findings 4, 5, 6 are directed primarily to the portions of those findings purporting to show that the survey was requested "for the purpose of identifying the sections 16 and 36 [that] were located or included in said townships" (R. 462–463). There is no evidence to support those portions of the findings. (There is no evidence whatsoever for any part of finding 4.) The supporting evidence for finding 5 (Pl. Ex. 7A, R. 188) and finding 6 (Pl. Exs. 7A, 8A, B, C, R. 188–192B) shows at most that the survey was requested to permit selection of the "lands donated to the State by the General Government * * *" (Pl. Ex. 8–C, Special Instructions to Surveyor, R. 190). The Enabling Act of 1890 (secs. 4, 6, 10, 11, Appendix, pp. 68–70) granted not only the school sections, but also 50 sections for public buildings, 90,000 acres for an agricultural college and 500,000 acres for other state institutions. The request for survey might very well have been directed to the fulfillment of those donations. The plaintiff recognizes that its objections on this point are of relatively small importance since the reason for the request for survey, even if it were material and had been accurately re-

veyed the exterior bounds of township 58–100 but did not subdivide that township (fdg. 9, R. 459).[3] The survey was duly inspected by the

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cited by the Special Master in his findings, cannot affect the finding of the ultimate fact of ownership in the United States.

In addition, as to Finding 6, the United States objected to the failure of the Special Master to find the facts as set out in Paragraph V of the Government's reply (R. 462–463, 12). The defendants in open court admitted the allegations of Paragraph V of the reply (R. 60) and the Special Master announced in open court he would find the facts as admitted (R. 60–61). Instead he found the facts substantially word for word as pleaded in the answer (Fdg. 6, R. 458). The report contains no explanation of this reversal and the plaintiff is aware of no justification for rejecting the defendants' admission and renouncing the ruling made in open court.

[3] Finding 9 recited the Coleman survey "did not subdivide" Township 58–100 "nor did the survey so identify or establish said section [36] as to identify or make susceptible of identification Section 36." This is correct. (See *infra*, pp. 21–35.) Defendants concede that Coleman did not subdivide the township (R. 8, 73).

However, finding 9 also recites that the Coleman survey "did mark the exterior corners of Section 36 in said Township 58, but that no survey was made at that time which subdivided said township into sub-sections." Plaintiff objected to this portion of the finding (R. 464). Confessedly a part of the objectionable language follows the phraseology of Paragraph VIII of the Government's reply (R. 13). Nevertheless, since it does not conform to the evidence it should not be incorporated in the findings. Having found in accord with the evidence that the township was not subdivided and that the survey did not identify or establish section 36, it is redundant, ambiguous and confusing to speak of the exterior corners of a non-existent section 36 or to speak of subdividing into "subsections" a township which was correctly found not to be subdivided at all. Accordingly, it is submitted that the objectionable portion of finding 9 should be stricken as requested in plaintiff's objection to the finding (R. 464). (See *infra*, pp. 21–30.)

Surveyor General for Wyoming who made the return to the Commissioner of the General Land Office. The survey was officially approved by the Commissioner on December 20, 1892. (Fdgs. 7, 8, R. 458–459.)[4]

It was not until sometime after 1914 that township 58–100 was subdivided into sections. The survey was officially approved on July 27, 1916, but seven months earlier the President had withdrawn the future section 36 in the township, along with other land, and placed it in Petroleum Reserve No. 41 (fdgs. 11, 12, R. 459).[5]

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[4] The plaintiff's objections 1 and 2 to finding 7 (R. 463) are withdrawn. Objection 3 (R. 463–464) dealing with the Special Master's refusal to admit certain exhibits in evidence is discussed *infra*, p. 24, fn. 12. There was no objection to finding 8.

[5] The Government's objections to findings 11 and 12 are directed mainly at the use of phraseology carrying the implication that the 1916 survey was a survey subdividing an existing section 36 into quarter-sections and not a survey subdividing township 58–100 into sections and quarter-sections (R. 464). It is quite clear from the Special Master's discussion on the point (Report, R. 443) that he recognized the 1916 survey to be a survey subdividing township 58–100 into sections. The use of the phrase "a survey of Section 36" in findings 11 and 12 no doubt was intended to mean a survey of the exterior lines of section 36, not a survey subdividing an existing section 36 into quarter-sections. The objectionable language apparently was lifted from the Government's reply (R. 14). Nevertheless, it is not in accord with the evidence consisting of the entire history of the 1916 survey (Pl. Exs. 33–37, 40–45, 47, 48, R. 240–246A, 249–302A, 303, 304–305), including (a) the field notes of the resurvey of the four exterior lines of township 58 and of the division of the township into sections and quarter-sections

The accounting issue.—In 1917, the Ohio Oil Company went upon the land and commenced operations (Report, R. 455). Five oil wells and three water wells were drilled (Def. Ex. A, R. 383; Report, R. 452). From the beginning of production through December 31, 1944, the Company's total earnings derived from section 36 were $168,317.53, of which $167,049.54 represents the value of 102,428.60 barrels of oil extracted from the section, and $1,267.99 represents steam earnings. The Company paid to the State $17,306.30 as royalties for the oil extracted during this period. (Def. Ex. A, R. 417; fdg. 13, R. 460.) Exclusive of royalties the Company expended through December 31, 1944 the sum of $215,490.97 in its operations on section 36, as follows: Capital expenditures, $118,628.84; operating expenses, $70,083.73; personal property and production taxes, $4,317.40; and overhead, $22,-461.00 (Def. Ex. A, R. 382; Report, R. 452).

At the hearing the Special Master directed that the case proceed on the title question separately from the accounting question. When the accounting phase of the case was reached, the Special Master refused to hear any evidence on the question of whether the defendants were innocent or wilful trespassers in connection with the issue of damages (R. 141). The United States then

(Pl. Exs. 41–44, R. 250–301), and (b) a plat of the survey of that township into sections and quarter-sections (Pl. Ex. 45, R. 302A). Findings 11 and 12 should be modified as suggested in the Government's objections (R. 464).

made an offer of proof of the defendants' knowledge of the Government's ownership, in support of the contention that the defendants were wilful trespassers (Pl. Exs. 49–91, R. 305–382). The Special Master refused to admit these exhibits into evidence (R. 144–148). The Government then rested, as did the defendants (R. 148).

On October 14, 1946 the Court received the report of the Special Master and ordered it filed. In that report the Special Master discussed the facts and applicable law relating to the title issue, concluded that the United States owned the section 36 in controversy, and made findings accordingly (Report, R. 440–448, 457–460).[6]

In his report the Special Master similarly discussed the accounting issue and reached the conclusion that the Government was entitled to recover nothing (Report, R. 449–457, 460–461). The report is silent with respect to the Government's contention that even if the defendants were innocent trespassers the United States was entitled to a joint and several judgment for the amount of royalties paid by the The Ohio Oil Company to the State. Findings 10 and 13 relate

[6] In the statement in support of its motion for leave to file the complaint, the Government explained that if the 1892 survey satisfied the requirements of the law as to identity of section 36, the Government would contend that in 1892 the land was known to be mineral and therefore title did not vest in the State (R. 2). No evidence of known mineral character was offered and the issue is not in the case.

to the accounting issue. The Government excepted to those two findings (R. 465–468), to the conclusion of law relating to the accounting issue, and to the concomitant section of the proposed decree (R. 469, 471). The Government also excepted to the provisions of the proposed decree relating to costs (R. 471).

SUMMARY OF ARGUMENT

I

A. The Special Master correctly found that at all times material the United States was and now is the owner of section 36. The United States has never parted with title. The grant contained in section 4 of the Enabling Act of 1890, c. 664, 26 Stat. 222, did not vest Wyoming with title to any unsurveyed land upon admission of the State into the Union. *United States* v. *Morrison,* 240 U. S. 192, 212; *Heydenfeldt* v. *Daney Gold, etc. Co.,* 93 U. S. 634, 638 (Br. pp. 18–19 *infra*).

B. Title to a school section 36 does not vest in Wyoming under the Enabling Act of 1890 until the lines of the section are surveyed and the survey officially approved by the Commissioner of the General Land Office. *United States* v. *Morrison,* 240 U. S. 192, 210–212; *Heydenfeldt* v. *Daney Gold, etc. Co.,* 93 U. S. 634, 637–639, 640 (Br. pp. 20–21, *infra*).

C. The Special Master correctly found that the survey in 1892 of the exterior lines of township

58–100 was not a survey of the lines of the future section 36 within the township nor did it identify or establish that section or make it susceptible of identification. Under the controlling statutes (R. S. 2395–2397) and regulations (Manual of Surveying Instruction, 1890) a section is not surveyed in the field until the section lines are run and measured, the section corners marked and field notes and plats of the survey prepared. The 1892 surveyor did none of those things with respect to section 36 or any other section in township 58–100. Even if a survey of public land is physically made and field notes and plats prepared, the land remains unsurveyed until the survey is accepted by the Commissioner of the General Land Office. A government survey "creates"; it does not merely "identify" a section 36. *Cox* v. *Hart,* 260 U. S. 427, 436; *United States* v. *Morrison,* 240 U. S. 192, 210. In 1892 not even the field work had been done with respect to the section 36 in controversy. The administrative decisions on the exact point sustain the Special Master's conclusion that the United States is the owner. *Barnhurst* v. *State of Utah,* 30 L. D. 314; *Harris* v. *State of Minnesota,* 1 Copp. L. L. 631 (Br. pp. 21–35, *infra*).

D. Until title passes to the State, the school section is the property of the United States and Congress may dispose of it as it sees fit. *United States* v. *Morrison,* 240 U. S. 192, 201, 205, 210,

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212; *Wisconsin* v. *Lane,* 245 U. S. 427. 433–434; *Heydenfeldt* v. *Daney Gold, etc., Co.,* 93 U. S. 634, 640. Prior to survey of the lines of section 36, the land was disposed of under authority of Congress by withdrawal into Petroleum Reserve No. 41. The land was thus "otherwise disposed of" and "reserved for public purposes" within the meaning of section 4 of the Enabling Act of 1890. It was included within a "reservation" as that word is employed in the Act of February 28, 1891, c. 384, 26 Stat. 796, applicable to Wyoming. Therefore title remained in the United States. *United States* v. *Stearns Lumber Co.,* 245 U. S. 436, 438–439; *Wisconsin* v. *Lane,* 245 U. S. 427, 434; *United States* v. *Morrison,* 240 U. S. 192; *Minnesota* v. *Hitchcock,* 185 U. S. 373; *Heydenfeldt* v. *Daney Gold, etc., Co.,* 93 U. S. 634 (Br. pp. 35–36, *infra*).

Before the Special Master the defendants argued that under section 5 of the Wyoming Enabling Act unsurveyed school lands were not subject to disposition by the United States. This contention is untenable. First, the language of section 5, on which defendants rely, in terms bars preemption and entry on unsurveyed school lands but does not prohibit withdrawals by the United States for public purposes; second, the bar against preemption and entry was in force only seven months when it was nullified by the Act of February 28, 1891, c. 384, 26 Stat. 796; third, the

Department of the Interior has consistently construed section 5 of the Wyoming Enabling Act to mean that the State acquired no rights in school lands settled under the homestead laws or otherwise disposed of prior to acceptance of the official survey. With knowledge of this administrative construction Congress reenacted the language on which the defendants rely, as a part of the Act of February 15, 1934, c. 12, 48 Stat. 350, amending section 5 of the Wyoming Enabling Act. Sen. Rept. No. 10, 73d Cong., 1st sess. (1933); H. Rept. No. 229, 73d Cong., 1st sess. (1933), pp. 3–4; and, fourth, acceptance of the defendants' argument would place Wyoming in a preferred position over its 28 sister states which have received school grants. This would be contrary to the established policy of Congress to place all school-grant states on an equal footing in these matters. It would mean that by the enabling act the United States had surrendered the freedom "to legislate touching the national domain in any way it saw fit, to promote the public interests." *Heydenfeldt* v. *Daney Gold, etc., Co.,* 93 U. S. 634, 640; *United States* v. *Morrison,* 240 U. S. 192, 200–201, 204–205. (Brief, pp. 37–40, *infra.*)

II

If The Ohio Oil Company's trespass was wilful it must pay the full value of the oil without deductions. *Wooden-ware Co.* v. *United States,* 106 U. S. 432; *Guffey* v. *Smith,* 237 U. S. 101, 118–

119; *Union Naval Stores* v. *United States,* 240 U. S. 284, 290, 292. The Special Master made no finding as to whether the Company's trespass was innocent or wilful. At the hearing he ruled that as a matter of law the issue of wilful trespass was not in the case; refused to hear evidence on the matter and sustained the defendants' objections to the Government's offer of documentary evidence to prove that the trespass was wilful (Br., pp. 41–45, *infra*).

A. The Special Master erred in ruling as a matter of law that the issue of wilful trespass was not in the case. A trespass is presumed to be wilful as a fact. *Liberty Bell Gold Mining Co.* v. *Smuggler-Union M. Co.,* 203 Fed. 795, 802, 804 (C. C. A. 8), certiorari denied, 231 U. S. 747. The Special Master's ruling was based on the plaintiff's pleadings alone. Plainly it was error to test the presence or absence of an essential issue by consideration of the pleadings of one party. When all of the pleadings are considered together there is no escape from the issue joined by the clear, repeated averments of "good faith" in the answer, which were denied in the reply. The complaint alone presents the issue of wilful trespass. It alleges the facts making the Company a trespasser and asks for relief to which the Government would be entitled only if the Company was a wilful trespasser. There was no obligation to allege bad faith or wilfulness in

terms. This would simply be pleading a conclusion of law. Implicit in the ruling of the Special Master is the suggestion that by pleading that a defendant claims possession under a lease from a co-wrongdoer the issue of wilfulness is eliminated from the case. The cases do not hold that wilfulness is excused if a trespasser claims from one who in fact is not the true owner of the land. *Union Naval Stores* v. *United States,* 240 U. S. 284 ;*Guffey* v. *Smith,* 237 U. S. 101 (Brief, pp. 45–51, *infra*).

B. On the record The Ohio Oil Company is liable as a wilful trespasser. The evidence to establish good faith resides with the defendants. They offered no evidence on the issue. Thus the record is blank as to why Wyoming issued leases both before and after the land was surveyed, and before and after it was made a part of a federal petroleum reserve. Similarly, there is nothing in the record to show why the Company exploited Government land which was part of a petroleum reserve. If the Company failed intentionally or negligently to ascertain who owned the land, the wilful character of its trespass cannot be excused. *Eppenauer* v. *Ohio Oil Co.,* 128 F. 2d 363, 364–365 (C. C. A. 5), certiorari denied, 306 U. S. 632. If it trespassed or continued to trespass knowing the United States was the owner it is liable as a wilful trespasser. *Guffey* v. *Smith,* 237 U. S. 101; *Union Naval Stores* v. *United States,* 240 U. S. 284.

After 1929 there is positive proof that the Company knew that the United States, not Wyoming, owned the land. The documents offered by the Government show that in 1929, upon inquiry, the United States informed Wyoming that the State had no title. A responsible officer of the Company checked the facts and submitted a detailed title opinion concluding that the State had no title. This, too, was the view of the Commissioner of Public Lands for Wyoming. The documents show affirmatively that since October 12, 1929, the defendants knew of the Government's claim of ownership and since January 1930 they knew that the Government owned the land (Brief, pp. 52–57, *infra*).

C. The cases on which the Special Master relies do not support his opinion that the trespass was innocent. *Gulf Refining Co.* v. *United States,* 269 U. S. 125, and *Martel* v. *Hall Oil Co.,* 36 Wyo. 166, discussed (Brief, pp. 57–61, *infra*).

III

The United States is entitled to a joint and several judgment against the defendants for the amount of royalties paid by the Company to Wyoming plus interest. *Mason* v. *United States,* 260 U. S. 545, 559–560 (Brief, pp. 62–63, *infra*).

IV

The provisions of the proposed decree concerning costs are ambiguous and may subject the

United States to the payment of a portion of the defendants' costs. The United States is not liable for costs (Brief, pp. 63–64, *infra*).

V

The date that the property is surrendered, not the date of the decree, should control the end of the period of accounting after judgment (Brief, pp. 64–65, *infra*).

ARGUMENT

I

THE UNITED STATES IS THE OWNER OF SECTION 36

The United States has never parted with the title to section 36. It is the Government's position (1) that the grant of school sections in section 4 of the Wyoming Enabling Act of 1890 did not vest Wyoming with title to any unsurveyed land upon admission of the new State; (2) that title does not pass until the lines of the future section are surveyed in the field and the survey officially approved and accepted by the Commissioner of the General Land Office; (3) that the survey made in 1892 was merely a survey of the exterior lines of township 58–100 and was not a survey of the lines of the future section 36 nor did it identify or make susceptible of identification the future section 36; and (4) that a survey of the lines of the future section 36 authorized in 1914 was not accepted by the Commissioner of

the General Land Office until July 27, 1916. Seven months before the 1916 survey, and while the land was unsurveyed, it was withdrawn as a part of a petroleum reserve, thus removing it from the operation of the grant contained in section 4 of the enabling act.

A. THE GRANT OF SCHOOL SECTIONS CONTAINED IN SECTION 4 OF THE ENABLING ACT OF 1890 DID NOT OPERATE TO VEST WYOMING WITH TITLE TO UNSURVEYED SCHOOL LAND UPON ADMISSION OF THE STATE INTO THE UNION

The law is clear that title to unsurveyed school lands does not pass upon admission of the new State. *United States* v. *Morrison,* 240 U. S. 192, 212; *Heydenfeldt* v. *Daney Gold, etc. Co.,* 93 U. S. 634, 638. Also see *Wisconsin* v. *Lane,* 245 U. S. 427, 432; *Hedrick* v. *Hughes,* 15 Wall. 123, 129. Cf. *Sherman* v. *Buick,* 93 U. S. 209, 214. If Congress had intended that title pass upon admission, there would have been no occasion for authorizing Wyoming to select lieu lands where the school sections "have been or shall hereafter be reserved for public purposes."[1] *Heydenfeldt* v. *Daney Gold, etc. Co.,* 93 U. S. 634. By the Enabling Act of 1890 Congress merely granted a quantity of land equal in amount to the sections 16 and 36 in the proposed township (id. pages 638–640). Congress did not guarantee that a sec-

[1] The quoted language is found in section 6 of the Act of August 9, 1888, c. 819, 25 Stat. 393, assimilated into the Wyoming Enabling Act by section 4 of that act (Appendix, pp. 66–68).

tion 16 or 36 would exist in each township but only that on the acceptance of the survey defining the school section, title would pass to the State provided there had been no prior disposition of the land. As this Court pointed out in *United States* v. *Morrison,* 240 U. S. 192, 200–201:

> * * * It must have been manifest to Congress, executing this definite policy with respect to the vast area of the public lands, that not improbably a long period would elapse in the case of numerous townships before surveys would be completed. Not only was it inevitable that upon survey there would be found to be fractional townships in which there would be either no section sixteen, or thirty-six, or only a portion of one or the other, but in various instances there might be prior claims, or actual settlements, or it might appear before surveys were had that there were important public interests which in the judgment of Congress should be subserved by some other disposition of lands of a particular character. On the other hand, it was not important to the State that it should receive specific lands, if suitable indemnity were given.

See also *United States* v. *Stearns Lumber Co.,* 245 U. S. 436, 439; *Wisconsin* v. *Lane,* 245 U. S. 427, 433–434; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 400–401.

B. TITLE TO A SCHOOL SECTION 36 DOES NOT VEST UNDER THE WYOMING ENABLING ACT OF 1890 UNTIL AN OFFICIAL SURVEY OF THE LINES OF THE SECTION IS APPROVED BY THE COMMISSIONER OF THE GENERAL LAND OFFICE

Until the lines of a school section are surveyed and the survey officially approved the land remains the property of the United States. *United States* v. *Morrison,* 240 U. S. 192, 210–212; *Heydenfeldt* v. *Daney Gold, etc. Co.,* 93 U. S. 634, 637–639, 640; *United States* v. *Ickes,* 72 F. 2d 71, 75 (App. D. C.); *State of Utah,* 53 I. D. 365, 368; *State of New Mexico,* 52 L. D. 679, 680; *F. A. Hyde & Co.,* 37 L. D. 164; see also *Cox* v. *Hart,* 260 U. S. 427, 436; *Wyoming* v. *United States,* 255 U. S. 489, 500; *Gaines* v. *Nicholson,* 9 How. 356, 364–365; *F. A. Hyde and Company,* 48 L. D. 132, 133–134.

The lines of the section 36 in controversy were not surveyed in 1892 and approval of the 1892 survey of the exterior lines of the township could not constitute approval of a non-existent survey of the lines of the section within the township. The Special Master found (fdg. 9, R. 459) and the defendants concede (R. 8, 73) that in 1892 township 58–100, in which the controverted land lies, had not been subdivided into sections and that the lines of section 36 were not officially surveyed until 1916, subsequent to the withdrawal of the land for a petroleum reserve (fdgs. 11, 12, R. 459). In 1892 only the east, south and west exterior lines of what is now township 58–100

were surveyed.[8] But the defendants argued to the Special Master that the 1892 survey of the exterior township lines "was sufficient in equity to identify or make susceptible of identification Section 36 * * *." (Report, R. 442.) From this stems their contention that upon approval of the 1892 survey "Section 36 was withdrawn and set apart from the public lands of the United States and was irrevocably appropriated to the Wyoming school grant," and therefore the 1915 withdrawal order was ineffective as to section 36 (Report, R. 442). The Special Master, however, found that the 1892 survey did not "so identify or establish said section as to identify or make susceptible of identification Section 36" (fdg. 9, R. 459) and found the United States to be the owner of the land (fdg. 3, R. 457). Those findings are fully supported by the record.

C. THE 1892 SURVEY OF THE EXTERIOR LINES OF TOWNSHIP 58–100 WAS NOT A SURVEY OF THE LINES OF THE FUTURE SECTION 36 IN THE TOWNSHIP, NOR DID IT IDENTIFY THE FUTURE SECTION 36

1. *The 1892 survey did not establish or identify any of the lines or corners of the future section 36.*—The defendants' contention that the 1892 survey of the exterior lines of township 58–100 sufficed to identify section 36 is pitched on the proposition that the initial mile of the south and

[8] The north line of the township is a part of the boundary between Wyoming and Montana, which had been previously surveyed in 1880 (Pl. Ex. 14 for iden., R. 216).

east exterior boundaries of the township constitute the south and east lines of the future section 36.[9] That proposition is in conflict with the statutes and regulations governing surveys of public land. It is directly contrary to the decisions of this Court and of the Department of the Interior.

a. *Under the statutes governing surveys of public lands a section is not surveyed in the field until the section lines are run and measured and the section corners marked.*—This is plainly spelled out by the laws in force at the time of the 1892 survey (R. S. 2395–2397, now codified as 43 U. S. C. 751–753). Section 2395 contains eight numbered subsections of which the first three are of primary pertinence here.[10] The first provides for dividing public lands into townships six miles square. The second directs that the corners of townships must be marked and each distance of a mile between such corners also must be marked. The third provides for the subdivision of the township into 36 sections each containing about 640 acres. So far as township 58–100 is concerned, the 1892 survey never passed beyond the second subsection of R. S. 2395. No attempt was made to fulfill the requirements of the third subsection of

[9] The defendants do not account for the north and west lines of the future section 36.

[10] For full text of pertinent portions of R. S. 2395, see Appendix, pp. 74–76.

2395. Township 58–100 was not subdivided in 1892.

b. *Under the regulations governing surveys of public lands in 1892 a section is not surveyed in the field until the section lines are run and measured and the section corners marked and field notes and plats of the survey prepared.*—What was done by Coleman, the 1892 surveyor, did not constitute a survey of any of the lines of section 36. This becomes apparent from an examination of the regulations which controlled his contract and which he was obligated by law to follow.[11] Thus the provisions of the 1890 Manual required that each line of each section be run, measured and marked; that section corners be marked; that detailed field notes of the work be prepared and that plats of the survey drawn to a specified scale be prepared in triplicate. (Manual, pp. 37–40, 41–49; Appendix, pp. 77–80, 81–82.) What Coleman did was to survey three of the exterior lines of township 58–100. He did nothing more with respect to that township. Accordingly, there was no occasion for him to prepare field notes or plats

[11] The regulations governing the survey under Coleman's contract are contained in the Manual of Surveying Instructions (1890)—legally the Manual of December 2, 1889, which by statute and in terms was a part of Coleman's contract. Act of October 1, 1890, c. 1262, 26 Stat. 650 (R. 188B). Pertinent portions of the 1890 Manual are printed in the Appendix, pp. 76–82.

of a survey subdividing township 58–100 and none was prepared.[12]

In the absence of field notes or a plat of such a survey there was nothing for the Commissioner to examine or act upon in 1892. And, of course,

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[12] Coleman's contract covered 12 townships. One of these was township 58–100. Coleman subdivided or sectionalized 10 townships and a little over one-half of the eleventh. For each of these eleven townships he prepared a plat on a scale of 40 chains to one inch as required by the 1890 Manual, p. 49 (Appendix, p. 82). These were a part of the return on his survey (Pl. Exs. 16–26, R. 223–233). The entire return and related papers consisting of 19 exhibits were offered in evidence in support of the allegations of Paragraph VI of the reply (Exs. 9–27, R. 193–234). Of these 19 exhibits, 11 were refused admission into evidence (R. 64–71) when the defendants objected on the ground that under the pleadings the "proposed exhibit and any of its material contents is admitted" (R. 64, 66). In sustaining the objection to each of the eleven exhibits, the Special Master ruled there was no issue on the allegations of Paragraph VI of the reply (R. 66). He previously had stated that in view of the defendants' admission he would find "those [Par. VI of the reply] to be the facts; so it is not necessary to have proof on that" (R. 61). However, despite his declaration in open court, the Special Master found the facts not as pleaded in the reply but as pleaded in Paragraph VI (R. 8) of the defendants' answer. The Government believes the exhibits should be treated as if they were in evidence in view of the Special Master's failure to abide by his declaration in open court to find the facts as admitted by Wyoming. (See Objection 3 to finding 7, R. 463–464.)

The return included no plat for township 58–100 since Coleman did not subdivide township 58–100 into sections. In his discussion (Report, R. 441–442) the Special Master, referring to the 1892 survey and speaking of township 58–100, states: "The plat shows the establishment of the following parts of Section 36, the section with which we are

no such plat was filed in the district land office as required by law. R. S. 2395—8th (Appendix, pp. 75–76); *United States* v. *Morrison*, 240 U. S. 192, 210. Yet the defendants' argument before the Special Master was the equivalent of saying that even without field notes and without a plat there can be an approved official survey identifying a section within a township.

The defendants seemed to find comfort in the fact that the 1892 surveyor fixed markers at the southeast corner of the township and at the end of the initial mile north and west of that corner. But the mile markers fixed on the exterior township lines in the 1892 survey were not necessarily the section corners after subdivision of the township. In finding 9, the Special Master found that

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interested: The southeast corner thereof, the quarter section point to the north and the northeast corner thereof. Westerly from the southeast corner there was established the quarter corner and the southwest corner. However, no interior lines were established." One thing is certain, the Special Master's use of the word "plat" was inadvertent since no plat ever was prepared or submitted and accordingly none is or could be in the record (the Special Master makes no reference to any exhibit). Coleman did prepare and there was included in the return a *diagram* of township 58–100 prepared to a scale of 2 miles to one inch (Pl. Ex. 15, R. 222) as distinguished from a *plat* which is on a scale of one-half mile to an inch (Pl. Exs. 16–26, R. 223–233). A *diagram*, unlike a *plat*, does not form a basis for the disposal of public lands. It is used as an administrative aid to show the exterior lines for the information of a subdividing surveyor and to designate the length of the lines run to permit computation of the surveyor's compensation which under the contract was on a mileage basis (R. 89).

the Coleman survey did not subdivide township 58–100 or identify or establish section 36 (Report, R. 459). The finding recites, however, that Coleman "did mark the exterior corners of Section 36" and to this portion of the finding the Government objected (R. 464; see *supra*, p. 6). The instructions in the 1890 Manual, p. 37, for surveying exterior township lines directed the surveyor that "In running random [trial] lines temporary corners are to be set at each 40 and 80 chains, and permanent corners established upon the true line as corrected back * * *" (Appendix, p. 76). The Manual does not refer to them as "section corners" but simply as "corners" whereas in the instructions dealing with the subdivision of townships into sections the references are to "quarter section corners" and "section corners" (Manual, p. 38, Appendix, p. 78). The 1892 surveyors contract and instructions were to subdivide the townships and as he set markers on the 40 and 80 chain intervals on the exterior township lines he referred to them as "¼ sec. corner" and "cor. to secs.", respectively, having in mind, no doubt, the anticipated subdivision. But the statute (R. S. 2395–2d) specified that mile markers be set on the exterior township lines and the Manual makes it clear that those markers are not conclusive on the subdividing surveyor as corners of the future sections.

For example, the 1890 Manual, p. 40 (Appendix, p. 79) provided, with exceptions not here material,

that every section line running north-and-south "must be *eighty chains* in length" and "within *eighty links* of equal length." The section lines running east-and-west, with exceptions not here material, were to be within 80 links of the width established on the south boundary line of the township for that tier of sections and were to "close within fifty links north or south of the section corner."

On the basis of the 1892 survey of the exterior lines of township 58–100, how could it possibly be determined whether the east and west lines of the section (which run north-and-south) each were 80 chains in length and were within 80 links of equal length, when the west line was not even run, let alone measured; how could it be shown whether the north and south lines of the section (which run east-and-west) were within 80 links of the distance measured for the width of the tier established on the south boundary of the township, when the north line never had been run, measured or marked; how could it be determined whether the north and south lines of the section closed within 50 links of the four section corners when there were no section corners established and, treating the mile corners on the exterior township lines as section corners, there was no interior section corner or mile corner common to the future sections 25, 26, 35 and 36.

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The survey of 1892 was no more a survey of the lines of section 36 in township 58–100 than it was a survey of the lines of section 27 in the heart of that township. In the language of this Court "if title [to a school section] passes [to a state] upon survey, it must be upon a survey duly completed according to the authorized regulations of the Department." *United States* v. *Morrison,* 240 U. S. 192, 211. No sensible construction of the regulations of the Department of the Interior, as set out in the 1890 Manual, can lead to the conclusion that the 1892 survey made in accordance with instructions governing the survey of "Exteriors or Township Lines," Manual, p. 37, (Appendix, pp. 76–77) satisfied the regulations governing the subdividing of townships, Manual, pp. 37–39, (Appendix, pp. 77–79) or identified any of the lines or corners of the future section 36.

c. *That the 1892 survey did not establish or identify any of the lines or corners of the future section 36 is demonstrated by the lines and corners actually established by the 1916 survey subdividing township 58–100.* The Special Master pointed this out in his report, (R. 443).

It was not until the 1916 survey was completed that the lines and corners of section 36 were established and the section was identified. The 1916 surveyed retraced the entire east line of township 58–100. He located the monument marking the original southeast corner of the township and

the half mile and mile markers set by the 1892 surveyor (Pl. Exs. 42, 45, R. 257–259, 302A). Until the retracement actually was accomplished, however, there was no east line of the future section 36. Had he been unable to locate the original monuments, or if on retracing had he found the exterior lines were improperly run, measured or marked, a resurvey and the establishment of new corners would have been necessary. Thus on the east 2½ miles of the south line of township 58–100 the 1916 surveyor did not find the half mile and mile markers set by the 1892 surveyor. He ran new lines, measured the distances and marked quarter section and section corners. (Pl. Exs. 41, 45, R. 250–254, 302A.) In short, he made a resurvey. Until that was done in 1916 there was no southwest corner of section 36 fixed in the field and there could not be a south line of section 36.

Also, the 1916 surveyor ran, measured and marked for the first time the west line of section 36, establishing the northwest corner of the section. He ran, measured and marked the north line of section 36 and found that that line intersected the east boundary 12 links south of the mile corner fixed by Coleman in 1892 and therefore was within the allowable limits of 50 links. (Pl. Exs. 44, 45; R. 276, 302A). This mile corner then became the northeast corner of section 36. The point is that this could not be known until the subdivision took place. Upon subdivision of

the township, this corner might have been found out of limits by more than 50 links as was the case with respect to the northeast corner of section 25 (128 links) and the quarter section corner of section 24 (127 links) in the same township 58–100. In those instances, in 1916 the surveyor fixed a new section corner and a new quarter-section corner. (Pl. Exs. 42, 45; R. 260, 302A.) Had he found the northeast corner of the future section 36 similarly out of limits, a new northeast section corner would have been established. But until the section lines were actually run and measured there were no northeast, northwest, southeast or southwest section corners of section 36 within the purview of the controlling regulations.[13]

2. *A government survey "creates"; it does not merely "identify" a section 36.* We have shown that the 1892 survey of the lines of township 58–

[13] On the strength of the foregoing discussion the Government submits that its objections to findings 9, 11 and 12 (R. 464) should be sustained and those findings corrected to avoid the possible impression from finding 9 that the 1892 survey established any exterior corners of section 36, when, in fact, mile corners, not section corners, were established and to avoid the inference obviously unintended by the Special Master, which might be said to follow from the objectionable language in finding 9, 11 and 12 to the effect that the 1892 survey subdivided township 58–100 into sections but not subsections (see *supra*, pp. 6, 7, fns. 3, 5). Even if the Special Master's findings of evidentiary facts concerning title are not corrected in accordance with the Government's objections, it is clear that his finding 3, that the United States owns the land, is fully supported by the record. As a matter of fact there is no evidence to the contrary.

100 did not *in fact* identify any of the lines or corners of section 36 (pp. 21–30, *supra*). Neither did that survey identify or establish section 36 in law. The defendant's theory that a survey of the exterior lines of a township identifies section 36 is premised on an erroneous concept of the office of a government survey. A government survey "creates"; it does not merely "identify" sections of land. *Cox* v. *Hart,* 260 U. S. 427, 436; *United States* v. *Morrison,* 240 U. S. 192, 210; *Sawyer* v. *Gray,* 205 Fed. 160, 163 (W. D. Wash.); *Smith* v. *City of Los Angeles,* 158 Cal. 702; *Bullock* v. *Rouse,* 81 Cal. 590; *Powers* v. *Jackson,* 50 Cal. 429, 432; *Middleton* v. *Low,* 30 Cal. 596, 605; *Robinson* v. *Forrest,* 29 Cal. 317, 325; *Barnhurst* v. *State of Utah,* 30 L. D. 314; *Harris* v. *State of Minnesota,* 1 Copp L. L. 631.

The doctrine was clearly enunciated in *Cox* v. *Hart, supra,* where this Court stated (p. 436):

> * * * A survey of public lands does not *ascertain* boundaries; it *creates* them. *Robinson* v. *Forrest,* 29 Cal. 317, 325; *Sawyer* v. *Gray,* 205 Fed. 160, 163. Hence the running of lines in the field and the laying out and platting of townships, sections and legal subdivisions are not alone sufficient to constitute a survey. Until all conditions as to filing in the proper land office and all requirements as to approval have been complied with, the lands are to be regarded as unsurveyed and not subject to disposal as surveyed lands. *United States* v. *Morrison,*

240 U. S. 192, 210; *United States* v. *Curtner,* 38 Fed. 1, 10. It follows that although the survey may have been physically made, if it be disapproved by the duly authorized administrative officers the lands which are the subject of the survey are still to be classified as unsurveyed. In other words, to justify the application of the term "surveyed" to a body of public land something is required beyond the completion of the field work and the consequent laying out of the boundaries, and that something is the filing of the plat and the approval of the work of the surveyor.

Thus, in *United States* v. *Morrison,* 240 U. S. 192, 210, this Court held that title to a school section 16 remained in the United States where it was withdrawn for a national forest after the exterior lines of the township were run, measured and marked, the township subdivided—meaning that all lines of all sections were run, measured and marked—field notes and plats prepared evidencing the sectionalization of the township and the entire survey approved by the Surveyor General. Despite completion of the actual survey work the court held there was no official survey of the school section and title did not pass to the state. The thing lacking was the approval of the survey by the Commissioner of the General Land Office.

The Court followed the principle that there is no survey until it has been completed in accordance with the regulations of the Department of

the Interior (p. 211). In the *Morrison* case, the Commissioner's approval required by the regulations was absent. In this case there is lacking even more basic requirements imposed by the regulations, namely, the actual running, measuring and marking of the section lines and the preparation of field notes and plats. True, the Commissioner approved the 1892 survey. But in 1892 the Commissioner was acting only on what was before him. There was no evidence before him of a survey of the lines of section 36 but only of a survey of the exterior lines of a township. Approval of such a survey cannot be stretched to constitute approval of a nonexistent survey of section lines.

The administrative decisions on the exact point sustain the Special Master's conclusion that the United States is the owner. Congress has confided the execution of the laws which regulate the surveying, the selling, and the general care of the public lands of the United States to the Department of the Interior. *Knight* v. *U. S. Land Association,* 142 U. S. 161, 178; *United States* v. *Schurz,* 102 U. S. 378, 396. The decisions of that Department on those matters have been given great weight by the courts, particularly since many outstanding titles are based on those decisions. *McLaren* v. *Fleischer,* 256 U. S. 477, 481, and cases cited in footnote 2, p. 481.

Two of the several decisions of the Department of the Interior on the point are on "all fours"

with the case at bar. *Barnhurst* v. *State of Utah,* 30 L. D. 314; *Harris* v. *State of Minnesota,* 1 Copp. L. L. 631. In both cases the exterior township lines had been surveyed but the townships had not been subdivided. In both cases, after the survey of the exterior lines of the township, settlers went on what would be the eastern portions of school section 36. Thereafter, the lines of the sections 36 were surveyed. In both cases the question was whether the survey of the exterior lines of the township could be denominated a survey of the section 36 within the township so as to vest title in the State under its grant from the United States. In both cases it was held that a survey of the exterior township lines was not a survey of the future section 36 within the township and that title was in the settlers claiming from the United States and not in the State.

There is absolutely no controlling distinction between those two administrative decisions and the case under consideration. Those administrative holdings made long before this controversy arose are in conformance with the principles laid down by this Court in *Cox* v. *Hart,* 260 U. S. 427, and *United States* v. *Morrison,* 240 U. S. 192. And whenever the question has arisen the Department of the Interior consistently has adhered to the principles of these decisions. *Mahoganey No. 2 Lode Claim,* 33 L. D. 37; *State of South Dakota* v. *Trinity Gold Mining Company,* 34 L. D. 485.

It is submitted that the Special Master correctly found that the 1892 survey of the exterior lines of township 58–100 was not a survey of the lines of the future section 36 nor did it identify or establish that section or make it susceptible of identification.

D. WHILE THE LAND WAS UNSURVEYED IT WAS WITHDRAWN BY THE UNITED STATES FOR A PETROLEUM RESERVE AND THEREFORE NEVER FELL WITHIN THE OPERATION OF THE GRANT TO WYOMING

Until title does vest in a state, the school section is the property of the United States and Congress is at liberty to dispose of the land as it sees fit. *United States* v. *Morrison,* 240 U. S. 192, 201, 205, 210, 212; *Wisconsin* v. *Lane,* 245 U. S. 427, 433–434; *United States* v. *Stearns Lumber Co.,* 245 U. S. 436, 439; *Heydenfeldt* v. *Daney Gold, etc. Co.,* 93 U. S. 634, 640; *Cobban* v. *Hyde,* 212 Fed. 480 (N. D. Cal.); cf. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 400; *United States* v. *Curtner,* 38 Fed. 1, 9 (N. D. Cal.), reversed on other grounds, 149 U. S. 662.

Here, prior to survey of the lines of school section 36, the land was disposed of under authority of Congress when by order of December 6, 1915, the President withdrew the land in controversy from "location, settlement, sale, or entry" and reserved it as a part of Petroleum Reserve No. 41 for classification and in aid of legislation (fdg.

12, R. 459).[14] The land thus was "otherwise disposed of" and "reserved for public purposes" within the meaning of section 4 of the Enabling Act of 1890. It was included within a "reservation" as that word is employed in the Act of February 28, 1891, c. 384, 26 Stat. 796.[15] From this it follows that the withdrawal of December 6, 1915, removed the land from the operation of the 1890 grant and title remained in the United States. *United States* v. *Stearns Lumber Co.*, 245 U. S. 436, 438–439; *Wisconsin* v. *Lane*, 245 U. S. 427, 434; *United States* v. *Morrison*, 240 U. S. 192; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Heydenfeldt* v. *Daney Gold, etc. Co.*, 93 U. S. 634; *Utah* v. *Work*, 6 F. 2d 675 (App. D. C.), affirmed, 273 U. S. 649; *United States* v. *Curtner*, 38 Fed. 1 (N. D. Cal.), reversed on other grounds, 149 U. S. 662; *State of Utah*, 53 I. D. 365; *State of Utah* v. *Lichliter*, 50 L. D. 231, 235.

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[14] The withdrawal was under authority of the Act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, c. 369, 37 Stat. 497, authorizing the President "at any time in his discretion, temporarily [to] withdraw from settlement, location, sale, or entry any of the public lands of the United States * * * and reserve the same for * * * classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

[15] The Act of February 28, 1891, applies to Wyoming. *Wyoming* v. *United States*, 255 U. S. 489, 493. It was so held at Wyoming's own petition. *State of Wyoming*, 27 L. D. 35, 38; cf. *Johnston* v. *Morris*, 72 Fed. 890, 895–896 (C. C. A. 9).

Before the Special Master the defendants argued that under the terms of the grant to Wyoming unsurveyed school lands were not subject to disposition by the United States.[16] The defendants pointed to section 5 of the enabling act as demonstrating an intention to reserve unsurveyed school land to the State. Section 5 provides (Appendix, p. 68) that land "granted for educational purposes" "shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

The short answer to this argument is that the prohibition of the quoted language in terms is limited to preemption and entry. It is no bar to withdrawals by the United States for public

[16] The defendants also relied on the Organic Act of July 25, 1868, sec. 14, c. 235, 15 Stat. 178, 183, organizing the Territory of Wyoming as conferring on the future state title to the school sections. Of course if title did not vest upon admission of the State into the Union, it could not vest under the organic act. While Wyoming was a Territory, all public lands within it were the property of the United States. *Irvine* v. *Marshall*, 20 How. 558, 561–562. During the entire life of the organic act, unsurveyed school lands were subject to preemption and entry as well as to disposition under the land laws of the United States. The organic act was not a grant. *Union Pac. Ry. Co.* v. *Karges*, 169 Fed. 459, 461 (C. C. Nebraska). In any event "* * * the rights of the State are to be determined by the act of admission rather than by any prior declaration by Congress of its purpose in respect to certain lands." *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391.

purposes. In any event this provision was in force only seven months when it was nullified by the Act of February 28, 1891, c. 384, 26 Stat. 796, which granted the State "other lands of equal acreage" "where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six" (Appendix, p. 72). At Wyoming's own petition the 1891 Act was held applicable to it (see fn. 15, p. 36, *supra*).

Finally, the very language of section 5 on which Wyoming relies was reconsidered by Congress when it had before it the bill eventually enacted as the Act of February 15, 1934, c. 12, 48 Stat. 350, amending section 5 of the Wyoming Enabling Act. The Committee on Territories of the Senate and of the House each was informed by the Secretary of the Interior that the language of section 5, here under discussion, had been consistently construed administratively to mean that the State acquired no rights in unsurveyed school lands included within a national forest, settled under the homestead laws, or otherwise disposed of through any appropriation applicable to unsurveyed lands. Sen. Rept. No. 10, 73d Cong., 1st sess. (1933); H. Rept. No. 229, 73d Cong., 1st sess. (1933) pp. 3–4. With this full understanding of the administrative construction of the law, the bill was reported and the portion of sec-

tion 5 on which defendants rely was reenacted. The reenactment is a clear congressional recognition and approval of the administrative construction placed upon the quoted language. *Koshland* v. *Helvering,* 298 U. S. 441, 445 and cases there cited in fn. 10; *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466; *United States* v. *Ryan,* 284 U. S. 167, 175. Cf. *Dismuke* v. *United States,* 297 U. S. 167, 174.

Acceptance of Wyoming's view would require a departure from the steadfast policy of Congress to place all of the school grant states on an equal footing with respect to the Government's right to dispose of lands granted for school purposes before approved survey of those lands. Nothing in the language or history of the Wyoming Enabling Act sustains the argument that in this matter Congress intended to place Wyoming on a preferred footing over its sister states, of which 24 had received school grants prior to Wyoming's and four subsequent to Wyoming's. Cf. *United States* v. *Morrison,* 240 U. S. 192, 205, and enabling acts cited at page 198, fn. 1.

If the defendants are correct, the United States would have been precluded from disposing of any of its public lands in Wyoming until they were segregated by survey from the granted lands. Otherwise, if before survey the United States had withdrawn public land for a military, Indian, or other public reservation, the unsurveyed school

lands within those reservations would remain the property of the State, or, if the withdrawal were construed as a taking, the State would be entitled to just compensation for those lands. Wyoming itself has never so understood its rights. Whenever the occasion has arisen Wyoming has sought and received lieu land equal in quantity to the unsurveyed school lands withdrawn into national reserves.[17] Wyoming's argument, if adopted, would mean that persons who, prior to survey, had occupied and improved land under the federal land laws, would lose their possessions and labor in case it turned out they had settled on school sections. It would mean, in the language of this Court, that by the Enabling Act the United States surrendered the freedom "to legislate touching the national domain in any way it saw fit, to promote the public interests." *Heydenfeldt* v. *Daney Gold, etc. Co.*, 93 U. S. 634, 640; *United States* v. *Morrison*, 240 U. S. 192, 200–201, 204–205.

It is submitted that the Special Master correctly found that the United States is the owner of the section 36 in controversy and correctly concluded that the Government is entitled to a decree quieting title.

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[17] *Douglas* 01043, approved March 3, 1910; *Douglas* 01209, approved March 3, 1910; Wyoming List 162, approved July 7, 1907; *Buffalo* 05068, approved December 20, 1935.

II

THE UNITED STATES IS ENTITLED TO RECOVER THE FULL VALUE OF THE OIL EXTRACTED FROM SECTION 36 BY THE OHIO OIL COMPANY FROM THE BEGINNING OF PRODUCTION AND THE FULL AMOUNT OF OTHER INCOME THE COMPANY RECEIVED FROM THE SECTION

(Plaintiff's exceptions relating to the accounting issue, R. 465–471)

It has been shown and the Special Master found that at all times material the United States owned section 36 (fdg. 3, R. 457). Accordingly, The Ohio Oil Company has been a trespasser in possession of government property during its entire period of operations. During that period, up to December 31, 1944, the Company has extracted oil valued at $167,049.54 and has received $1,267.99 in other earnings from the land. During the same period the Company paid Wyoming $17,306.36 in royalties and expended $215,490.97 in its operations on section 36, as follows: Capital expenditures, $118,628.84; operating expenses, $70,083.73; personal property and production taxes, $4,317.40; overhead, $22,461.00. (R. 417; fdg. 13, R. 460.)[18]

[18] This information is found in the statement of account placed in evidence by the defendants (Def. Ex. A, R. 417). Most of it is recited in the discussion in the Report (R. 452), but only part of it is contained in the findings. Because of the omissions the Government excepted to finding 13, dealing with the subject, and proposed a new finding stating all essential facts (R. 465–468).

If the trespass was wilful the United States is entitled to recover the full value of the oil taken by the Company without deductions of any kind. *Wooden-ware Co.* v. *United States,* 106 U. S. 432; *Guffey* v. *Smith,* 237 U. S. 101, 118–119; *Union Naval Stores* v. *United States,* 240 U. S. 284, 290, 292; see *Martel* v. *Hall Oil Co.,* 36 Wyo. 166, 178. If the trespass was not wilful the Company is entitled to deduct certain of its expenditures from the value of the oil.[19] In either event the United States is entitled to recover the royalties paid by the Company to Wyoming (see *infra,* pp. 62–63).

Whether the trespass was innocent or wilful is a question of fact extending to an essential issue in this case. As to the Company, there is no finding on this issue. As to Wyoming, finding 10 (R. 459) recites that the State "in good faith treated said [the 1892] survey as a complete sur-

[19] Before the Special Master the Government contended that even if the trespass were innocent the defendants were entitled to deduct only actual "lifting" or operating expenses and not capital expenditures, taxes, overhead and royalties. The Special Master sustained the Government's objection to the deduction of royalties but allowed the deduction of the other items. The Government has now concluded that no objection should be interposed to the allowance of capital expenditures if the trespass is held to have been an innocent one. Since the amount of the capital expenditures and the operating expenses taken together exceed the value of the production, there is no point in arguing the correctness of the deduction of taxes and overhead. Accordingly, the Government withdraws its exceptions (c) and (f) to finding 13 (R. 465) as well as the corresponding exception 2, relating to the conclusions (R. 470).

vey of Township 58" and "in good faith, since said time [1892] claimed title" to section 36 and in 1917 placed the Company in possession under a lease. This does not satisfy the obligation to make a finding on the ultimate fact as to whether the trespass was innocent or willful and, in any event, there is no evidence to support finding 10. There cannot be. The Special Master refused to hear evidence on the issue of innocent or wilful trespass.

At the very outset of the hearing before any evidence was offered on any issue, the Special Master announced as his tentative view that "apparently there has been good faith" (R. 24). Again, before any evidence was offered on the accounting issue he expressed as his tentative opinion that in a case such as this "there is always a presumption of good faith, and I believe it is my duty to indulge in that" (R. 55); that he would "not hear testimony that goes to the question of bad faith, because I do not believe bad faith has been properly pleaded." (R. 56); "that under the Government's pleading there is a presumption of good faith * * *" (R. 94–95); and that testimony as to wilfulness would be excluded "because, in my opinion, you have negatived bad faith by the allegations of your complaint" (R. 106). He announced as his final ruling (R. 141): "It is my ruling that, at this point, The Ohio Oil Company is there under a claim of right and is

not a willful trespasser, and it is not necessary for The Ohio Oil Company or the State of Wyoming to offer any proof on that." And again (R. 141): "Now, as a preface, having now ruled, as I do rule, that under the state of the record at this point The Ohio Oil Company is an innocent trespasser, * * * or is not a willful trespasser, the burden is on you—[the Government]." At the time of the final ruling the "state of the record" so far as the wilful trespass issue was concerned, consisted of the pleadings. No evidence had been offered on the point at that time by either side.

The Government insisted that the question of whether the trespass was innocent or wilful was an issue in the case and that the burden was on the defendants to prove their trespass was innocent, and not on the plaintiff to prove the trespass was wilful (R. 139–141). The Special Master overruled this contention and not only refused to require the defendants to proceed with their burden of rebutting the presumption of wilful trespass but held that the issue was not in the case and refused to receive evidence relating thereto. It was then that the Government offered documentary proof in support of its contention that the trespass was wilful (Pl. Ex. 49–91 for iden., R. 305–382). The defendants objected to the introduction of each of those documents on the ground that it was "wholly irrelevant and im-

material" because "there is no issue on this matter before this Court at this time" (R. 144). The objections were sustained and none of the exhibits was admitted into evidence (R. 144–148). The defendants offered no evidence on the issue of willful or innocent trespass. The plaintiff has taken exception to the Special Master's findings and conclusions relating to the accounting issue and to his failure to find that the defendants were willful trespassers (R. 465–471).

A. THE SPECIAL MASTER ERRED IN RULING AS A MATTER OF LAW THAT THE ISSUE OF WILFUL TRESPASS WAS NOT IN THE CASE

The Special Master erred in excluding the issue of wilful trespass. The law is settled that the burden is on the wrongdoer to prove his trespass is innocent. "A trespass on the property of another, in the absence of any other proof, is naturally presumed to be willful and intentional as a fact * * *" and is not presumed to be innocent as the Special Master thought (R. 55, 94–95; Report, R. 449). *Liberty Bell Gold Mining Co* v. *Smuggler-Union M. Co.*, 203 Fed. 795, 802, 804, 805 (C. C. A. 8), certiorari denied, 231 U. S. 747; *Central Coal & Coke Co.* v. *Penny*, 173 Fed. 340, 344 (C. C. A. 8); *Resurrection Gold Min. Co.* v. *Fortune Gold Min. Co.*, 129 Fed. 668, 679 (C. C. A. 8); *United States* v. *Homestake Min. Co.*, 117 Fed. 481, 486 (C. C. A. 8); *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corporation*, 20 F. 2d 67, 71 (C. C. A. 6); see *United States* v. *Ute Coal & Coke*

Co., 158 Fed. 20, 23 (C. C. A. 8); *Summers, Oil and Gas*, sec. 23, pp. 34–35.

The rationale of the rule is that a trespass on the property of another by its very nature is wrongful and liability flows for all resulting damage. The proof as to whether the trespass is innocent or wilful usually is in the possession of the trespasser. If he desires to mitigate damages by making deductions, the burden falls on him to establish that he is an innocent trespasser. See cases cited *supra*, pp. 45–46.

It is clear that the Special Master's ruling that the issue of wilful trespass was not in the case as made on the pleadings. It could not be otherwise because at the time the ruling was made there was no evidence in the record on the issue of wilful trespass. (See, *supra*, pp. 43–44.) Yet apparently it was not based on all of the pleadings but on the plaintiff's pleadings alone (R. 24, 55, 56, 94–95, 106, 141; Report, R. 449–450). The Special Master's report does not explain why the defendants' answer was excluded from consideration. Early in the hearing, for other purposes, he had recognized that the case was "committed to [him] on the issues joined in the pleadings as filed" (R. 26). Plainly it was error to test the presence or absence of an essential issue in the case by consideration of the pleadings of one party only. We shall show, however, that the issue was presented not

only by all the pleadings but by the complaint alone.

1. *All of the pleadings considered together present the issue of wilful trespass.*—The complaint alleged that the United States is the owner of section 36; that the State claims some right adverse to the United States; that the Company is in possession and claims some right under oil and gas leases from the State and has extracted oil valued in excess of $165,000; and that the State and the Company have no right, title or interest in the land. The Government prayed for judgment for the full value of all oil extracted from the land with interest. (R. 3–5.) In their answer the defendants denied the Government's title; alleged that defendants in "good faith" believed the State was the owner; that the leases to the Company were granted and accepted in that "good faith" belief; that the work done on the section was done under that "good faith" belief; that any oil and gas produced was produced under that "good faith" belief; that in the event the United States was adjudged to be the owner the Company should be given credit for all of its expenses; and that the expenses exceeded the value of the oil produced (R. 5–6). These allegations of the answer were denied by the Government's reply (R. 11).

On these pleadings issue was joined. The Government believes that the presence or absence

of wilful trespass as an issue must be tested by all the pleadings, not by the plaintiff's pleadings alone as the Special Master has done. And if the pleadings of both parties are considered, there is no escape from the issue joined by the affirmative, clear and repeated averments of "good faith" in paragraph 5 of the answer (R. 5–6), all of which were denied by the reply (R. 11). The answer is present and should not have been disregarded by the Special Master.

2. *The complaint considered alone presents the issue of wilful trespass.*—The Special Master confined himself to the plaintiff's pleadings (Report, R. 449). The reply denies the affirmative allegation of "good faith" pleaded in the answer (R. 11). How can a denial that defendants were trespassing in "good faith" possibly be construed as having "negatived any bad faith" (R. 106)? But even if the reply is not considered, the Special Master erred since the issue of wilful or innocent trespass is presented by the bare allegations of the complaint alone.

When the complaint alleged that the Company was in possession and that it had no right, title or interest in the land, it stated the facts which made the Company a trespasser. Furthermore, the prayer of the complaint demanded judgment for "the full value of all gas, oil, and other petroleum products extracted from said land," relief to which the Government would be entitled only

if the Company were a wilful trespasser. In the face of the demand in the complaint for the full value of production with interest it can scarcely be said that the defendants were not given notice of the Government's intention to hold them liable as wilful trespassers. And, of course, that they actually received notice is shown by the repeated, affirmative allegations of good faith in the answer (R. 5–6) (see p. 47, *supra*).

There was no obligation on the part of the Government to allege bad faith or wilfulness in so many words in the complaint. It is true that the complaint does not contain formal, technical and legalistic verbiage such as "wrongfully", "unlawfully", "wilfully", "with full knowledge of the Government's ownership", "in bad faith", or similar phraseology. For the United States to allege that the Company acted wrongfully or unlawfully in extracting the oil would be to plead a conclusion of law which flows from the factual allegations that the United States is the owner and the Company has no right in the property.[20]

[20] The complaint fully satisfies the Federal Rules of Civil Procedure which this Court promulgated to govern procedure in the federal district courts. Rule 8 (a) (2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled." Rule 8 (e) (1) states that "No technical forms of pleading or motions are required." It requires only that each averment be "simple, concise, and direct." The Special Master himself stated he was "going to try to

Cf. *Garbutt* v. *Blanding Mines Co.*, 141 F. 2d 679, 681 (C. C. A. 10). When the Government alleged unlawful possession of its land, the burden was cast upon the defendants to plead good faith as a fact and to prove the fact.

Presumably the Special Master entertained the view that the mere use of the stock pleading language in Paragraph IV of the complaint [21] that Wyoming claimed an interest adverse to the United States, coupled with the statement in Paragraph V that the Company claimed a right under leases from the State completely eliminated any question of wilfulness from the case (Report, R. 450). Carried to its logical conclusion this would mean that a true owner cannot recover full damages from a trespasser no matter how wilful the trespass is in fact, if the trespasser claims under a lease from a co-wrongdoer. No decision has been found excusing wilfulness simply because the trespasser claims from one who in fact is not the true owner of the land.

In *Union Naval Stores* v. *United States,* 240 U. S. 284, the *Stores Company* purchased products manufactured from crude turpentine. The

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follow the rules laid down for the District Court" although he did not consider them binding (R. 55). Thus where the rules required a ten-day notice on a demand for admissions and the Government gave only nine days, the Special Master ruled the demand untimely (R. 55).

[21] "The State of Wyoming claims some right, title or interest in said land adverse to the United States" (R. 3).

seller had manufactured the products from crude which he had taken from trees on public land. He claimed the right to tap the trees under a lease from a homesteader who had not perfected his entry. The seller was held to be a wilful trespasser and the purchaser was charged with the value of the manufactured products it bought, the measure of damages applicable to a wilful trespasser. The issue of wilful trespass was not excluded from the case simply because the seller *claimed* under a turpentine lease from one who had no title.

In *Guffey* v. *Smith,* 237 U. S. 101, the true owner of the land issued two oil and gas leases to different lessees. The holder of the earlier lease sued the subsequent lessee who had extracted oil from the land. The issue of wilfulness was not excluded from the case, even though the subsequent lessee claimed, not from a trespasser, but from the true owner. On the merits the subsequent lessee was held to be a wilful trespasser from the date of actual knowledge of the earlier lease. In *Eppenauer* v. *Ohio Oil Co.,* 128 F. 2d 363 (C. C. A. 5), certiorari denied, 306 U. S. 632, the defendant attempted to justify under a deed from a third party but there also the claim of right did not serve to eliminate the issue of wilfulness. Cf. *Central Coal & Coke Co.* v. *Penny,* 173 Fed. 340 (C. C. A. 8).

The Special Master erred in ruling that the issue of wilful trespass was not in the case.

B. ON THE RECORD IN THIS CASE THE OHIO OIL COMPANY IS LIABLE AS A WILFUL TRESPASSER

It is true in this case as it was in *Liberty Bell Gold Mining Co.* v. *Smuggler-Union M. Co.*, 203 Fed. 795, 804 (C. C. A. 8), certiorari denied, 231 U. S. 747, that the evidence to establish good faith is "solely in the possession of the trespasser, as he alone knows the reasons and intent which induced him to commit the trespass." Neither defendant offered evidence on the issue. Thus, the State did not explain why it issued leases first in 1915 before the land was surveyed, again in 1916 when the land had been withdrawn as a petroleum reserve and was still unsurveyed, and thereafter when the land was surveyed but continued to be a part of the petroleum reserve (Pl. Exs. 62, 61 for iden. R. 318–325). Likewise, The Ohio Oil Company was mute as to its reasons for exploiting Government land in 1917 when that land by executive order was a part of a federal petroleum reserve. The facts establishing the Government's ownership were matters of public record in both the local land office and the General Land Office in Washington (Pl. Exs. 1–6, R. 150A–186). There is no evidence to negative actual notice of the Government's title.

Certainly the Government does not know what reasons led the defendants to trespass. Either the Company intentionally or negligently failed to ascertain from the readily available public records who owned the land, the United States or

the State; or, after learning the true facts, the Company began and continued its operations with full knowledge that the section belonged to the United States. Under the first alternative the Company's action, in the absence of any explanation, was so reckless that it cannot be classified as excusable to the extent of relieving the Company from paying for its error. *Eppenauer* v. *Ohio Oil Co.*, 128 F. 2d 363, 364, 365 (C. C. A. 5) certiorari denied, 306 U. S. 632; *Central Coal & Coke Co.* v. *Penny*, 173 Fed. 340, 345–346 (C. C. A. 8); *Resurrection Gold Min. Co.* v. *Fortune Gold Min. Co.*, 129 Fed. 668, 679–680 (C. C. A. 8). Under the second alternative, if the Company had actual knowledge that the Government owned the land, its liability as a wilful trespasser is clear. *Guffey* v. *Smith*, 237 U. S. 101, 119; *Union Naval Stores* v. *United States*, 240 U. S. 284, 290; *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corporation*, 20 F. 2d 67 (C. C. A. 6); cf. *Hall Oil Co.* v. *Barquin*, 33 Wyo. 92, 149. The record as it now stands is silent as to the reasons and intent behind the trespass. Since these are matters solely and peculiarly in the possession of the defendants and since the defendants have chosen to make no disclosure or explanation it must be presumed as a fact that the trespass was wilful and intentional from its inception. *Liberty Bell Gold Mining Co.* v. *Smuggler-Union M. Co.*, 203 Fed. 795, 802, 804, 805 (C. C. A. 8), certiorari

denied, 231 U. S. 747; *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corporation,* 20 F. 2d 67, 71 (C. C. A. 6); *Central Coal & Coke Co.* v. *Penny,* 173 Fed. 340, 344 (C. C. A. 8); *Resurrection Gold Min. Co.* v. *Fortune Gold Min. Co.,* 129 Fed. 668, 679 (C. C. A. 8); *United States* v. *Homestake Min. Co.,* 117 Fed 481, 486 (C. C. A. 8); *United States* v. *Ute Coal & Coke Co.,* 158 Fed. 20, 23 (C. C. A. 8); cf. *United States* v. *Denver & R. G. R. R.,* 191 U. S. 84, 91–92; *Northern Pacific Railroad* v. *Lewis,* 162 U. S. 366, 377. *Summers, Oil and Gas,* sec. 23, pp. 34–35.

After 1929, it is unnecessary to rely on a presumption of fact alone.[22] There is positive proof that the Company knew the State had no title and knew the United States owned the land.

The Government offered in evidence a series of documents of which all but two were found among the records of the Office of the Commissioner of

[22] In view of the presumption of wilfulness which attaches to a trespass, the Government believes the defendants should be held liable as wilful trespassers for the entire period of production. Out of abundant caution, however, the Government excepted to the Special Master's failure to find the defendants were wilful trespassers at least since October 12, 1929 when the record shows affirmatively they were aware the United States owned the land (R. 468). The record thus permits the defendants to be held liable as wilful trespassers either from the beginning of production or since October 12, 1929.

Public Lands for Wyoming.[23] These documents make it plain that at least as early as 1929 the defendants knew they were trespassers on section 36, but nevertheless continued to trespass. These exhibits show that it was not until October 1929 that the State inquired of the United States as to whether the Government owned the section (Pl. Exs. 50, 52 for iden., R. 306–309). Wyoming was promptly informed by the Commissioner of the General Land Office that it had no title because the land had been included in a petroleum reserve prior to acceptance of the survey (Pl. Ex. 53 for iden., R. 309). An investigation of the facts relating to the withdrawal and the survey by the Company corroborated the information received from the Commissioner of the General Land Office (Pl. Exs. 58, 59, 61 for iden., R. 314–316, 318–323). A responsible official of the Company submitted a detailed title opinion to the General Counsel of the Company in which it was concluded that the State had no title (Pl. Ex. 61 for iden., R. 318–322). The State Commissioner of Public Lands was of the same opinion

[23] As previously explained the Special Master ruled as a matter of law that the issue of wilful trespass was not in the case and that the defendants need not offer any proof on that matter (supra, pp. 43–44). It was then that the Government offered its exhibits 49–91 for iden. (R. 305–382) to prove wilfulness. The Special Master refused to admit them into evidence. This ruling was erroneous since the issue of wilfulness was in the case (supra, pp. 45–52). (See plaintiff's exception 3, R. 469.)

(Pl. Exs. 62, 64 for iden., R. 323–325, 327–328). This documentary proof refutes the Special Master's statement, unsupported by any evidence, that "Here we have a situation where the defendant State at all times in perfect good faith asserted title to the land in question and believed that it had title, * * *" (Report, R. 451).[24] On the contrary the documents show that since October 12, 1929, if not earlier, both defendants were completely aware of the Government's claim of ownership, and since January 1930 knew the Government's claim was a valid one (Pl. Exs. 61, 62, 64 for iden., R. 318–325, 327–328). After 1929 the defendants devoted their efforts to unsuccessful attempts to obtain legislation from Congress which would grant the land to the State or would authorize a conveyance (Pl. Exs. 62, 64, 65, 67, 68, 69, 70, 72, 73, 74, 75, 76, 86, 89 for iden., R. 323–325, 327–344, 353–354, 359–361).

The Ohio Oil Company is a trespasser and under the law the trespass was wilful unless proven innocent. If the Company was an innocent trespasser, proof of that fact resides with it. On

[24] This evidence likewise completely refutes the Special Master's finding 10 "that the State of Wyoming in good faith treated said [1892] survey as a complete survey of Township 58 and * * * since said [1892] time claimed title to said section * * *" (R. 459). Nowhere in the documentary proof, much of which consists of correspondence discussing the title to the section, is there a single reference to the survey in 1892; the only survey mentioned is the one approved in 1916. As set forth heretofore, finding 10 is not supported by any evidence (supra pp. 42–43).

this record there is no proof of innocence. It follows that The Ohio Oil Company should be held liable for the full value of production and income from section 36. (See Exception 1, R. 468.)

C. THE CASES ON WHICH THE SPECIAL MASTER RELIES DO NOT SUPPORT HIS OPINION THAT THE TRESPASS WAS INNOCENT

In his report (R. 450–451) the Special Master expressed the "opinion that the trespass here was an innocent one under claim of right . . ." He based this opinion "very largely upon the language used by this Court" in *Gulf Refining Co.* v. *United States,* 269 U. S. 125 (R. 451). The Special Master thought that in the *Gulf Refining Co.* case "this Court held that [the] trespasser could continue in possession of lands originally taken in good faith even after a judgment against him and not be charged with willful trespass" (R. 451).

The Special Master incorrectly analyzed the holding in the *Gulf Refining Co.* case. That case was a sequel to the case of *Mason* v. *United States,* 260 U. S. 545. In the *Gulf Refining Co.* case the Government sought an accounting for oil extracted *pendente lite* between the end of the period of accounting covered by the original judgment in the *Mason* case and the cessation of operations by the defendants after the proceedings on appeal. The entire operations of the defendants were conducted at a loss but a profit was shown for the period *pendente lite* considered by itself.

The circuit court of appeals held that the trespasser was not entitled to offset any part of the loss suffered during the initial period against the value of the oil produced *pendente lite*. This Court referred to the ruling of the circuit court of appeals as having "proceeded from the standpoint that one who continues in possession of lands, originally taken in good faith, after judgment against him, may not have the advantage of the good faith of his original entry to enable him to offset his expenditures against the value of the oil extracted after judgment pending proceedings on appeal." (269 U. S. at pages 136–137.)

Apparently it was from the quoted language that the Special Master gained his impression that the *Gulf Refining Co.* case stood for the proposition that where the original trespass was in good faith the trespasser could not subsequently be charged with wilfulness. But that language was used to characterize the erroneous basis of the decision of the circuit court of appeals which was reversed. This Court made it perfectly plain that the issue of wilful trespass was not in the case when it stated (p. 137): "* * * we are not here dealing with the common law doctrine in respect of trespassers in good faith * * *." The Court explained that the measure of damages fixed in the *Mason* case was controlled by the Louisiana Code which permitted the cost of production to be deducted from the value of the oil

"even though the defendants went into possession in technical bad faith but in moral good faith" (p. 134); and that the same measure applied to the period of accounting *pendente lite* as applied to the period covered by the judgment in the *Mason* case (p. 137). A reading of the opinion makes it apparent that the *Gulf Refining Co.* decision turns primarily on the peculiar provisions of the Louisiana Code which are not applicable in the case at bar.

The Special Master misconceived the holding of this Court in the *Gulf Refining Co.* case. Where the question has arisen this Court has held that even though a trespass is innocent in its origin it may subsequently become wilful. *Guffey* v. *Smith*, 237 U. S. 101, 118–119.

The Special Master cited *Martel* v. *Hall Oil Co.*, 36 Wyo. 166,[25] as holding that the rule of damages in Wyoming "unquestionably" "is the equitable

[25] The Special Master also cited *United States* v. *Standard Oil Co. of California*, 21 F. Supp. 645 (S. D. Cal.) affirmed, 107 F. 2d 402 (C. C. A. 9), certiorari denied, 309 U. S. 654, 673; and *Mason* v. *United States*, 260 U. S. 545. (Report, R. 451). In the *Standard Oil* case the Government conceded that Standard was "entitled to deduct, from the value in place of the oil and gas converted, the cost of its drilling and operating expenses. [Citations.] By this concession, the government, in effect, concedes good faith to Standard." 21 F. Supp. 653–654. In the *Mason* case this Court held that the measure of damages was determined by Louisiana law and that a Louisiana statute provided for deduction of all costs of production. 260 U. S. 545, 555–559. Wyoming has no comparable statute.

rule rather than the strict common rule" (Report, R. 451). In the *Martel* case, the trespasser drilled a well and failed to find oil. The landowner sought to recover damages on the theory that when the trespasser proved there was no oil he destroyed the speculative mineral value of the land. The holding of the case has no application here. However, in speaking of the rule of damages in Wyoming the court did express the following (p. 178):

> Now in the ordinary case of trespass, where oil or other minerals are removed from land, the trespasser, if in good faith, is permitted to deduct his expenses from the value of the mineral taken from the land. Even in the case of willful trespass, he will merely lose what he produced, without reimbursement for the expenses which he has incurred.

How this supports the Special Master's position is not at all clear since so far as wilful trespass is concerned it is merely a restatement of the rule of damages applied by this Court in *Wooden-ware Co.* v. *United States*, 106 U. S. 432; *Guffey* v. *Smith*, 237 U. S. 101; and *Union Naval Stores* v. *United States*, 240 U. S. 284. It is exactly the rule which the Government contends should be applied in this case.

As a matter of fact, the Special Master did not clearly define the measure of damages he was

applying except to say it was "one that appeals to the conscience of the Court" (Report, R. 451). This legal cliche expresses an extremely elastic rule but it does not permit the chancellor to proceed in the absence of evidence and without regard to the law. Here, the defendants made no appeal "to the conscience of the Court." They offered no evidence even to suggest they honestly believed they had a right to be on the land.

It is submitted that as a matter of law a trespass is presumed to be wilful in fact. The defendants offered no evidence to rebut this presumption. As to Wyoming, there is no clear finding whether the State was a wilful or innocent trespasser and if finding 10, Report (R. 459) be treated as a finding of innocence, it is erroneous since there is no evidence to support it. As to the Company, there is no finding whatsoever as to whether its trespass was wilful or innocent. Patently the Special Master erred in ruling as a matter of law that the issue of wilful trespass was not in the case and in failing to admit the documentary evidence offered by the plaintiff (Exception 3, R. 469). We believe that on this record the Court should hold that the trespass was wilful and should give judgment to the Government for the full value of the production without deductions (Exception 1, R. 470).

III

THE UNITED STATES IS ENTITLED TO A JOINT AND SEVERAL JUDGMENT AGAINST THE DEFENDANTS FOR THE AMOUNT OF ROYALTIES WITH INTEREST

(Plaintiff's Exception (c) to Conclusion 2 (R. 469) and Exception 3 (R. 470–471))

The Special Master's report is completely silent as to the Government's demand for a joint and several judgment against the defendants for the amount of royalties paid by The Ohio Oil Company to Wyoming ($17,306.30 as of December 31, 1944, Fdg. 13, R. 460). It is the Government's position that even if it be assumed that the defendants were innocent trespassers, there can be no question as to the right of the United States to a joint and several judgment against the defendants for the royalties. *Mason* v. *United States,* 260 U. S. 545, 559–560; *United States* v. *Standard Oil Co. of California,* 21 F. Supp. 645, 654 (S. D. Cal.), affirmed, 107 F. 2d 402, 416 (C. C. A. 9), certiorari denied, 309 U. S. 654 and 309 U. S. 673. In the *Mason* case this Court said (pp. 559–560):

> These royalties arose from and were paid out of proceeds of the oil; but this oil belonged to the plaintiff as owner of the property from which it had been taken. The defendants who received the royalties were obviously not entitled to retain them, and having incurred no expense in connection with the mining operations, were liable for the entire amount and the defendants

who paid the royalties were jointly liable as co-wrongdoers. A joint judgment against all was therefore proper.

The *Mason* case is dispositive of the royalties question.

The Government's exception to the Special Master's failure to conclude that the defendants are liable for the amount of the royalties with interest computed by years from the dates of payments should be allowed and a joint and several judgment should be entered against the defendants in that amount.

IV

THE UNITED STATES IS NOT LIABLE FOR COSTS

(Plaintiff's exception and objection to final paragraph of proposed decree (R. 471))

The United States has excepted (R. 471) to the last paragraph of the Special Master's proposed decree (Report, R. 461) on the ground that the language concerning costs is ambiguous and confusing and may subject the United States to payment of a portion of defendants' costs. One provision of the proposed decree specifies that "none of said parties shall have and recover the costs expended by it herein," while the other recites "that the additional costs incurred in this court in the trial of this cause shall be divided equally between the parties hereto." It is not clear what distinction is intended between "the costs expended by it herein" and "the additional

costs incurred in this court in the trial of this cause." In any event if it was intended that the costs be divided in such a manner as to charge the United States with any portion of the costs incurred by either of the defendants (the Special Master suggests that the costs be equally divided three ways (Report, R. 456–457)), then the proposed decree would allow costs against the United States and accordingly would be contrary to law. *United States* v. *Barker,* 2 Wheat. 395.

V

THE DATE THE PROPERTY IS SURRENDERED, NOT THE DATE OF THE DECREE, DEFINES THE END OF THE PERIOD OF ACCOUNTING AFTER JUDGMENT

(*Plaintiff's exception* (*f*) *to Conclusion 2* (*R. 470*))

In his Conclusion 2 the Special Master limited the Government's right to accounting to a period ending with the "date" of the decree (Report, R. 460). In the proposed decree the Special Master directs that the property be surrendered within sixty days after judgment with provision for a joint statement of account from January 1, 1945, to the end of the 60-day period or earlier if the surrender is earlier (Report, R. 461). This provision of the proposed decree is inconsistent with the corresponding provision of conclusion 2.

Obviously, the date of surrender, not the date of the decree, should control the termination of the

supplemental period of accounting following the entry of judgment.

CONCLUSION

It is submitted that the United States is entitled to judgment as follows:

1. To a judgment quieting in the United States title to section 36;

2. To a judgment against The Ohio Oil Company for the full value of production, less royalties, ($151,011.23 as of December 31, 1944) derived from section 36 from the beginning of operations to the date the defendants surrender possession (not to exceed sixty days after the entry of judgment following the Special Master's recommendation); and

3. To a joint and several judgment against both defendants for the amount of royalties paid by the Company to Wyoming from the beginning of operations with interest.

Respectfully.

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MARCH 1947.

APPENDIX

Section 6 of the Act of August 9, 1888, c. 819, 25 Stat. 393.

SEC. 6. That where lands in the sixteenth and thirty-sixth sections, in the Territory of Wyoming, are found upon survey to be in the occupancy, and covered by the improvements of an actual pre-emption or homestead settler, or where either of them are fractional in quantity, in whole or in part, or wanting because the townships are fractional or have been or shall hereafter be reserved for public purposes, or found to be mineral in character, other lands may be selected by an agent appointed by the governor of the Territory in lieu thereof, from the surveyed public lands within the Territory not otherwise legally claimed or appropriated at the time of selection, in accordance with the principles of adjustment prescribed by section twenty-two hundred and seventy-six of the Revised Statutes of the United States, and upon a determination by the Interior Department that a portion of the smallest legal subdivision in a section numbered sixteen, or thirty-six, in Wyoming, is mineral land, such smallest legal subdivision shall be excepted from the reservation for schools, and indemnity allowed for it in its entirety, and such subdivisions, or the portions of them remaining after segregation of the mineral lands or claims, shall be treated as other public lands of the United States.

Act of July 10, 1890, c. 664, Secs. 2, 4, 5, 6, 7, 8, 10, 11, 13, 14, 26 Stat. 222 (Enabling act admitting Wyoming into the Union).

SEC. 2. That the said State shall consist of all the territory included within the following boundaries, to wit: Commencing at the intersection of the twenty-seventh meridian of longitude west from Washington with the forty-fifth degree of north latitude and running thence west to the thirty-fourth meridian of west longitude; thence south to the forty-first degree of north latitude; thence east to the twenty-seventh meridian of west longitude, and thence north to the place of beginning: *Provided,* That nothing in this act contained shall repeal or affect any act of Congress relating to the Yellowstone National Park, or the reservation of the park as now defined, or as may be hereafter defined or extended, or the power of the United States over it; and nothing contained in this act shall interfere with the right and ownership of the United States in said park and reservation as it now is or may hereafter be defined or extended by law; but exclusive legislation, in all cases whatsoever, shall be exercised by the United States, which shall have exclusive control and jurisdiction over the same; but nothing in this proviso contained shall be construed to prevent the service within said park of civil and criminal process lawfully issued by the authority of said State; and the said State shall not be entitled to select indemnity school lands for the sixteen and thirty-sixth sections that may be in said park reservation as the same is now defined or may be hereafter defined.

* * * * *

SEC. 4. That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided,* That section six of the act of Congress of August ninth, eighteen hundred and eighty-eight, entitled "An act to authorize the leasing of the school and university lands in the Territory of Wyoming, and for other purposes," shall apply to the school and university indemnity lands of the said State of Wyoming so far as applicable.

SEC. 5. That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

SEC. 6. That fifty sections of the unappropriated public lands within said State, to be selected and located in legal subdivisions as provided in section four of this act, shall be, and are hereby, granted to said State for the purpose of erecting public buildings at the capital of said State.

SEC. 7. That five per centum of the proceeds of the sales of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State.

SEC. 8. That the lands granted to the Territory of Wyoming by the act of February eighteenth, eighteen hundred and eighty-one entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho and Wyoming for university purposes," are hereby vested in the State of Wyoming, to the extent of the full quantity of seventy-two sections to said State, and any portion of said lands that may not have been selected by said Territory of Wyoming may be selected by the said State; but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said State and the income thereof be used exclusively for university purposes. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said State, and

no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted by the act of May twenty-eighth, eighteen hundred and eighty-eight, to the Territory of Wyoming for a fish hatchery and other public purposes shall, upon the admission of said State of Wyoming into the Union, become the property of said State.

SEC. 10. That ninety thousand acres of land, to be selected and located as provided in section four of this act, are hereby granted to said State for the use and support of an agriculture college in said State as provided in the acts of Congress making donations of lands for such purpose.

SEC. 11. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to the State of Wyoming, and in lieu of any claim or demand by the said State under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to the State of Wyoming, and in lieu of any grant of saline lands to said State, the following grants of land are hereby made, to wit:

To the State of Wyoming: For the establishment and maintenance and support in the said State of the insane asylum in Uinta County, thirty thousand acres; for

the penal, reform, or educational institution in course of construction in Carbon County, thirty thousand acres; for the penitentiary in Albany County, thirty thousand acres; for the fish-hatchery in Albany County, five thousand acres; for the deaf, dumb, and blind asylum in Laramie County, thirty thousand acres; for the poor farm in Fremont County, ten thousand acres; for a hospital for miners who shall become disabled or incapacitated to labor while working in the mines of the State, thirty thousand acres; for public buildings at the capital of the State, in addition to those hereinbefore granted for that purpose, seventy-five thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred and sixty thousand acres, making a total of five hundred thousand acres: *Provided,* That none of the lands granted by this act shall be sold for less than ten dollars per acre.

* * * * *

SEC. 13. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivision or portion of any smallest subdivision thereof in any township, shall be found by the Department of the Interior to be mineral lands, said State is hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said State in lieu thereof, for the use and the benefit of the common schools of said State.

SEC. 14. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the surveyed, unreserved and uppropriated (sic) public

lands of the United States within the limits of the State entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said State the number of acres heretofore donated by Congress to said Territory for similar objects.

Act of February 28, 1891, c. 384, 26 Stat. 796.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United State (sic) be amended to read as follows:

SEC. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided,* Where any State is entitled to said

sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever." And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however,* That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

SEC. 2276. That the lands appropriated by the preceding section shall be selected

from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three quarters of a section; for a fractional township, containing a greater quantity of land than one quarter, and not more than one half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land: *Provided,* That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

Revised Statutes 2395 now codified as 43 U. S. C. 751.

SEC. 2395. The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers,

may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require.

Second. The corners of the townships must be marked with progressive numbers from the beginning; each distance of a mile between such corners must be also distinctly marked with marks different from those of the corners.

Third. The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles; and by making a corner on each of such lines, at the end of every mile. The sections shall be numbered respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers till the thirty-six be completed.

Fourth. * * *

Fifth. * * *

Sixth. * * *

Seventh. * * *

Eighth. These field-books shall be returned to the surveyor-general, who shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales. He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; and a copy thereof shall be kept open

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at the surveyor-general's office for public information, and other copies shall be sent to the places of the sale, and to the General Land-Office.

PERTINENT EXCERPTS FROM THE 1890 "MANUAL OF SURVEYING INSTRUCTIONS FOR THE SURVEY OF PUBLIC LANDS OF THE UNITED STATES * * *"

EXTERIORS OR TOWNSHIP LINES

[p. 37] The east and west boundaries of townships are always to be run from south to north on a true meridian line; and the north and south boundaries are to be run from east to west, or from west to east (according to the location of the township to be surveyed with reference to prior surveys), on a *random* or trial line and corrected back on a true line. The distance north or south of the township corner to be closed upon, from the point of intersection of these random lines with the east or west boundary of the township, must be carefully measured and noted. Should it happen, however, that such random line should fall short, or overrun in length, or intersect the east or west boundary more than *three chains'* distance from the township corner thereon, as compared with the corresponding boundary on the south (due allowance being made for convergency), the line, and if necessary the entire exterior boundaries of the township, must be retraced, so as to discover and correct the error. In running random lines temporary corners are to be set at each 40 and 80 chains, and permanent corners established upon the true line as corrected back, in accordance with instructions, throwing the excess or deficiency on the west half mile, as prescribed by law. Permanent corners are to be established in accordance with instructions on the east and west township boundaries at the time they are run. Whenever practicable the town-

ship lines within these tracts of 24 miles square must be surveyed in regular order from *south* to *north,* i. e., the exterior boundaries of the township in any one range lying immediately north of the south boundary of such tract of 24 miles square must first be surveyed, and the exteriors of the other three townships in said range extended therefrom, in regular order from *south* to *north,* and it is preferable to first survey the entire range of townships in such tract adjoining the east boundary or adjoining the west boundary, and the other three ranges in regular sequence. In cases, however, where the character of the land is such that this rule cannot be complied with, the following will be observed:

In extending the *south* or *north* boundaries of a township to the *west,* where the *southwest* or *northwest* corners cannot be established in the regular way by running a north and south line, such boundaries will be run *west on a true* line, allowing for convergency on the west half mile; and from the township corner established at the end of such boundary, the west boundary will be run *north* or *south,* as the case may be. In extending *south* or *north* boundaries of a township to the *east,* where the *southeast* or *northeast* corner cannot be established in the regular way, the same rule will be observed, except that such boundaries will be run *east on a true line,* and the *east* boundary run *north* or *south,* as the case may be. One set of chairmen only is required in running township lines.

METHOD OF SUBDIVIDING

[p. 37] 1. The variation is to be found by observations on Polaris taken at or near the S. E. corner of the township. The

first mile, both of the [p. 38] south and east boundaries of each township you are required to subdivide, is to be carefully traced and measured before you enter upon the subdivision thereof. This will enable you to observe any errors that may have been made in former surveys either in direction or length of the lines and will also enable you to compare your chaining with that upon the township boundaries.

2. * * *

3. After adjusting your compass to the variation which you have determined by observation, you will commence at the corner to sections 35 and 36, on the south boundary, and run a line *parallel to*[1] *the range line,* forty chains, to the quarter-section corner, which you are to establish between sections 35 and 36; continuing on said course forty chains farther, you will establis the corner to sections 25, 26, 35, and 36.

4. From the section corner last named run a *random* line, without blazing, *parallel to the south boundary of section* 36, for the corner of sections 25 and 36, on east boundary, and at forty chains from the starting point set a post for *temporary* quarter-section corner. If you intersect exactly at the corner, you will blaze your random line back, and establish it as the *true* line; but if your random line intersects the said east boundary, either north or south of said corner, you will measure the distance of such intersection, from which you will calculate a course that will run a *true* line back to the corner from which your random started. You will establish the *perma-*

[1] The original print read "northwardly with true bearing of" instead of "parallel to." The manual was corrected to read as shown in this appendix by tissue inserts pasted opposite the page to be corrected.

nent quarter-section corner at a point equidistant from the two terminations of the *true* line.

5. * * *

6. * * *

[p. 39] 7. * * *

8. * * *

9. Quarter-section corners, both upon north and south and upon east and west lines, are to be established at a point *equidistant* from the corresponding section corners, except upon the lines closing on the north and west boundaries of the township, and in those situations the quarter-section corners will always be established at precisely *forty chains* to the north or west (as the case may be) of the respective section corners from which those lines respectively *start,* by which procedure the excess or deficiency in the measurements will be thrown, according to law, on the extreme tier of quarter-sections.

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PRESCRIBED LIMITS FOR CLOSINGS AND LENGTH OF LINES IN CERTAIN CASES

[p. 40] 1. Every north-and-south section line, except those terminating in the north boundary of the township, must be *eighty chains* in length.

2. The east-and-west *section lines,* except those terminating in the west boundary of the township, are to be within *eighty links* of the actual distance established on the south boundary line of the township for the width of said tier of sections, and must close within fifty links north or south of the section corner.

3. The north boundary and south boundary of any one section, except in the extreme western tier, are to be within *eighty links* of equal length.

4. The meanders within each fractional section, or between any two meander posts, or of an island in the interior of a section, must close within a limit

determined by allowing *five-eighths of a link* for *each chain* of said meander line when less than 80 chains in length. When the meander line is more than 80 chains in length the closing error must in no case *exceed* 150 links.

5. In running *random* township exteriors, if such random lines fall short or overrun in length, or intersect the eastern or western boundary, as the case may be, of the township, at more than *three chains* north or south of the true corner, the lines must be *retraced,* even if found necessary to remeasure the meridional boundaries of the township. One set of chainmen only is required in subdividing.

RETRACING TOWNSHIP LINES AND BOUNDARIES OF PRIVATE LAND CLAIMS

If, in subdividing a township, it is found that the exterior boundaries have been improperly run, measured, or marked, or the corners established thereon have been obliterated, the deputy will resurvey so much of said exterior boundaries as may be necessary, and establish new corners upon same wherever necessary. Where no subdivisions have been made on either side of a township boundary, it will be corrected, if necessary, in point of alignment as well as measurement, by establishing the section corners at lawful distances from the south or east boundaries of the township (as the case may be), and upon a right line extending between the township corners; and in such case, the old corners on said township boundaries will be destroyed.

Where subdivisional lines have been closed upon a township boundary in advance of the preliminary survey of the same, its alignment will not be changed. If it is found necessary to establish new corners on such boundary they will receive only the marks referring to the sections in the township being subdivided, and the marks on the old corners on such boundary, which refer to such sections, will be obliterated.

In all cases such necessary corrections will be made as will place the section corners at the aforesaid lawful distances from the south or east boundary, in order that a legal subdivision of the township may be made, and where new corners are thus necessarily established, the distance and direction between new and old corners must be carefully noted.

New corners on township boundaries must be established by a survey of such lines, and *in no case* will such corners be established from *data* acquired in running lines closing on such boundaries. One set of chainmen, only, is required in retracing township lines.

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FIELD NOTES

[p. 41] The proper blank books for field notes will be furnished by the surveyor-general, and in such books the deputy surveyor must make a faithful, distinct, and minute record of everything officially done and observed by himself and his assistants, pursuant to instructions, in relation to running, measuring, and marking lines, establishing corners, etc., and present, as far as possible, a full and complete topographical description of the country surveyed.

From the *data* thus recorded at the time when the work is done on the ground, the deputy must prepare *true* field notes of the surveys executed by him, in the manner herinafter prescribed, and return same to the surveyor-general, together with the required sketches, at the earliest practicable date after the completion of his work in the field.

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The field notes of the survey of base, meridian, standard, exterior, (p. 42) and subdivision lines are each to be written in *separate books*. The subdivisions of *each* township will form one book.

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[p. 43] Field notes of the subdivisional survey of townships must describe the corners and topography as above required, and the "general description" at the end of such notes must state minutely the character of the land, soil, timber, etc., found in such townships.

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[P. 47] SPECIMEN FIELD NOTES AND PLATS

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[p. 48] Each township plat is to be prepared in *triplicate:* one for the General Land Office, one for the United States district land office, and the third to be retained as the record in the office of the surveyor-general.

The plat for the local land office must not be forwarded until notice is received by the surveyor-general from the Commissioner of the General Land Office that the survey represented on said plat has been accepted, and that he is authorized to file the triplicate plat.

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[p. 49] All township plats are to be drawn to a uniform scale of 40 chains to 1 inch, United States standard, and diagrams of exteriors to a scale of 160 chains to 1 inch.

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With the copy of each township plat furnished to a district land office, the surveyor-general is required by law to furnish *descriptive notes* as to the character and quality of the soil and timber found on and in the vicinity of each surveyed line, and giving a description of each corner.

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